Smithfield Packing Co., Inc. *and* United Food and Commercial Workers Union Local 204. Cases 11–CA–18316, 11–CA–18415, 11–CA–18440, and 11–RC–6338

May 18, 2001

ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

This matter came to the Board on a request of the Acting General Counsel for special permission to appeal a ruling by Administrative Law Judge Pargen Robertson. The judge's ruling required a production of completed questionnaires that the Acting General Counsel had secured from employees who had signed union authorization cards but did not testify at the hearing. The questionnaires were secured during the Acting General Counsel's investigation of whether the evidence would support a *Gissel*[1] bargaining order against the Respondent.

Following receipt of the Acting General Counsel's appeal, the Board requested the judge to set forth in writing the basis for his Order requiring production of the questionnaires. On July 24, 2000, the judge issued the attached Response to the Board's Order. The judge explained that he ordered production of the questionnaires because they relate "to any matter" in question under Section 102.31(b) of the Board's Rules,[2] and because production would be in "the interest of due process and fair hearing."

After careful consideration, we have decided to grant the Acting General Counsel's request and reverse the judge's Order.[3] Section 102.118(a) of the Board's Rules prohibits disclosure of documents in the possession of the General Counsel, whether in response to a subpoena or otherwise, without the General Counsel's written consent. A limited exception to this rule is set forth in Section 102.118(b)(1), which requires the production of statements by the General Counsel or Charging Party witnesses after they have testified. However, no party contends that the questionnaires at issue here are producible under the Section 102.118(b)(1) exception. The employee card signers were not called to testify by the Acting General Counsel or Charging Party. At the trial, the Acting General Counsel sought to authenticate the cards through the testimony of a handwriting expert rather than that of the employee card signers themselves.[4]

Further, we do not agree with the judge that production of the questionnaires would be in "the interest of due process and fair hearing." As the cards are in evidence, the Respondent knows the identity of the card signers and could therefore secure their testimony to obtain the information in the questionnaires.[5] Thus, there is no basis to conclude that the Respondent would be prejudiced by failing to obtain the questionnaires. While, as the judge noted, production of the questionnaires might serve to speed the resolution of the hearing by providing a less time consuming and burdensome means of obtaining such information, ease and celerity do not necessarily implicate due process or a fair hearing. Nor is mere convenience to a party a sufficient reason to compel the discovery of questionnaires that are privileged from disclosure under Section 102.118.

Our colleague joins us in reversing the judge's order given the applicability of Section 102.118. However, he does so with "misgivings" about the fairness of that Section, because pursuant thereto "the General Counsel can secure documents in the possession of respondent but respondent cannot secure documents in the possession of the General Counsel." We do not share our colleague's misgivings. The Board's policy against disclosure of witness statements (except as provided in Sec. 102.118(b)(1)) is well established and has been sustained by the circuit courts.[6] Further, Congress has long recognized the Board's policy and never changed it.[7] As the courts have commented, that policy is grounded in "the peculiar character of labor litigation," where "witnesses" are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for

[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[2] The judge appears to have inadvertently cited to Sec. 102.30(b) of the Rules in support of his ruling. The reference appears to be to 102.31(b).

[3] We regret the delay in ruling on the Acting General Counsel's appeal. The judge's response was inadvertently sent to NLRB Records rather than filed with the Board's Executive Secretary, and was not brought to the Board's attention until after issuance of the judge's decision on January 23, 2001.

[4] See *Parts Depot, Inc.,* 332 NLRB No. 64, slip op. at 5 (2000), and cases cited there (authenticity of authorization cards may be established through handwriting expert). See also *Aero Corp*., 149 NLRB 1283, 1287 (1964), enfd. 363 F.2d 702 (D.C. Cir. 1966) (same).

[5] Although the judge noted that contacting these employees could be "a possibility expensive and fruitless effort," there is nothing in the record before us that would indicate whether or not these employees are available to testify.

[6] See cases cited in *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 237 fn. 16 (1978). See also *North American Rockwell v. NLRB*, 389 F.2d 866 (10th Cir. 1968). But see *NLRB v. Brookwood Furniture*, 701 F.2d 452, 469 (5th Cir. 1983).

[7] See *NLRB v. Robbins Tire & Rubber*, 437 U.S. at 238 (noting that Congress in enacting the investigatory records exemption [Exemption 7] to the FOIA in 1966 "was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the NLRA, and . . . the legislative history of the 1974 amendments affords no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved Board practice.")

reprisal and harassment."[8] Moreover, this "chilling effect on the Board's [investigatory] sources"[9] can exist regardless of whether the statements are sought prior to or during the trial. As the Supreme Court has noted, employees "may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify at a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated."[10] We therefore adhere to the Board's longstanding policy and reaffirm it.

Accordingly, for all the foregoing reasons, we grant the Acting General Counsel's request for special permission to appeal and reverse the judge's ruling requiring production of the questionnaires of employee card signers who did not testify at the hearing. In order to ensure that the Respondent has a full opportunity to present its defense in light of our ruling, we shall remand the case to the judge for further proceedings upon proper motion by the Respondent.

CHAIRMAN HURTGEN, concurring.

I concur with the conclusion of my colleagues. However, as discussed below, I do so with great reluctance.

This is a *Gissel* case. The Acting General Counsel (AGC) introduced 188 cards, 154 of which were introduced through a handwriting expert, i.e., the employees were not called as witnesses.

During the investigation, the Acting General Counsel sent questionnaires to the alleged card signers. The questionnaires sought to ascertain whether they had signed the cards and, if so, the circumstances of these signings.

At trial, the Respondent subpoenaed the responses. The AGC moved to quash (at least as to the 154 nonwitness employees). The administrative law judge denied the AGC's motion. The Board now reverses.

Section 102.31(b) relates, inter alia, to subpoenas duces tecum. It requires the production of "any matter . . . in question in the proceedings." The documents sought herein clearly fall within that Section. However, if the document is in the possession of the AGC, a different rule applies. Section 102.118 of the Board's Rules forbids the disclosure of materials in the possession of the General Counsel, "whether in response to a subpoena duces tecum or not." The only way to achieve disclosure is through the General Counsel's consent (not given here). The documents here are protected by that rule.

There is an exception to Section 102.118, but it does not apply here. Under Section 102.118(b)(1), if the General Counsel calls a witness, and if the General Counsel possesses a statement of the witness relating to his testimony, the General Counsel must produce the statement after direct examination. The exception is based on *Jencks*, and the statement can be used in cross-examination. In the instant case, the 154 employees were not called as witnesses, and thus the exception does not apply.

In sum, Section 102.118 is a rule of the Board, and it applies here. Thus, I shall apply it. However, I have misgivings about the rule. In essence, it permits a litigant (the General Counsel) to withhold relevant documents from the opposing party, and there is no comparable privilege for the opposing party. The General Counsel can secure documents in the possession of respondent, but respondent cannot secure documents in the possession of the General Counsel.

The application of Section 102.118 is particularly troublesome here. The documents are unquestionably relevant. In addition, any confidentiality has been lost—the card signers have been identified at trial. Further, there is no claim of attorney work product. Finally, although the Respondent could perhaps call the 154 witnesses, that would be time consuming and burdensome to these proceedings. At the very least, the documents could confine the inquiry to those employees whose responses raise questions.

Unlike the instant case, the cases cited by my colleagues involve *pretrial* disclosure. The one exception is in *North American Rockwell*. In that case, the employer sought a "blanket order" requiring the production, at trial, of any and all evidence inconsistent with the evidence presented by the General Counsel. The court denied that "blanket order." There is no such blanket order here.

Nor can there be any valid concern about protecting the identities of the employees. As my colleagues recognize, the identities of these employees have already been revealed by the handwriting expert who sought to verify their signatures. Indeed, if the Acting General Counsel had established verification through the employees themselves (the usual procedure), it is clear that these statements would have been producible under 102.118(b)(1). The issue in this case is whether the Acting General Counsel can hide the statements by using the device of calling a secondary source (the handwriting expert). For the reasons set forth above, I would be inclined to require production were it not for Section 102.118.

In sum, 102.118 raises issues as to the fairness of our proceedings, and as to our ability to conduct efficient hearings which search for truth. However, the rule is "on the books," and, absent a change, I shall apply it.

[8] *NLRB v. Robbins Tire & Rubber*, 437 U.S. at 240, quoting from *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976).

[9] Id. at 241.

[10] Id.

APPENDIX

RESPONSE TO BOARD ORDER

On July 19, 2000 the Board ordered that I discuss the basis for my order to General Counsel to produce questionnaires of employees that did not testify. General Counsel is seeking a *Gissel*[1] bargaining order. The employees that completed the requested questionnaires allegedly signed union authorization cards and those cards were relied on by General Counsel in attempting to establish that the Union represented a majority of the unit employees.

This matter has involved 13 hearing days as well as numerous conference calls between the attorneys and the administrative law judge. Several subpoenas issued by General Counsel and the Union were among the issues frequently discussed during those conference calls. At my direction Respondent permitted counsels for General Counsel and the Union access to its facility for examination of company records. Those examinations extended over several days. The question of production of questionnaires arose during a conference call. Respondent's subpoena was brought to my attention after both General Counsel and the Union had rested. I considered Respondent's request for production under both the subpoena provisions of the Board's rules[2] and under the Jencks rule (Section 102.118(b)(1)).

The Board directed consideration of *Aero Corp.*, 149 NLRB 1283 (1964). In *Aero* unlike here, the request for production was made under the Jencks rule[3] and the Board discussed the affidavits as tools for cross-examination. Here Respondent did not seek the questionnaires for cross-examination. The *Aero* request was for affidavits as opposed to questionnaires. In *Aero* the Union's asserted majority status did not depend on the authorization cards of those employees included in the request for affidavits. Here the Union's asserted majority did depend upon receipt of authorization cards signed by questionnaire employees. There were 188 authorization cards relied on to establish a majority and 154 of those cards were introduced through a handwriting expert.

In view of the facts before me it was apparent that Respondent's request for the questionnaires did relate "to any matter" in question as provided in Section 102.30(b) of the Board's rules. However, it was apparent that Section 102.30(b) conflicted with the mandate of Section 102.118 of the Board's rules. 1 determined that the interest of due process and fair hearing requited production of the questionnaires despite those apparent conflicts.

My determination to require production of the questionnaires was based on the possibility that the questionnaires may include information that conflicted with testimony of the handwriting expert as to signatures on authorization cards; on possible information as to what was said in soliciting the employees to sign the authorization cards and on possible information that may have otherwise supported Respondent's defense in this matter.

In deciding to apply Section 102.30(b) of the Rules, I considered the fact that none of the questionnaires were completed by unknown employees or former employees. The authorization cards were in evidence. Respondent knew the names of all 154 employees and former employees that signed authorization cards that were admitted on testimony by the handwriting expert. Therefore there was no question of confidentiality.

I was also aware that other avenues for Respondent's request for information, could have substantially extended the. time for completion of these proceedings. For example Respondent could have gone through a possibly expensive and possibly fruitless effort to locate all the 154 employees or former employees and interview them regarding the same matters included in the questionnaires. Additionally, Respondent could have requested a delay in closing the record while its attorneys filed a request for information under the Freedom of Information Act. However, I decided that these proceedings would best be served by directing production of the questionnaires.

I shall receive this response along with the Board's order in evidence in these proceedings as ALJ Exhibit 1 (see Sec. 102.30(b) of the Board's rules).

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[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1979).

[2] Eg., Sec. 102-31.

[3] The Jencks Act is found at 18 U.S.C.A. Sec. 3500. See Sec. 102.118 of the Board's rules and Rule 612 FRE.